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CONTENTS

THE DISTRICT COURTS OF MASSACHUSETTS

THE LATEST DISCUSSION OF DISTRICT COURT PROBLEMS, BY ROBERT T. BAMFORD.

Introductory Statement.

The District Court system has been a subject of discussion for about fifty years or more in reports of committees and commissions listed in the 15th Report of the Judicial Council (pages 106–108). Recently, a committee of the Boston Bar Association was requested to consider suggestions made in regard to the District Courts, and, believing that the problems presented called for consideration by the bar of more than one county, that committee invited the co-operation of all the bar associations in the Commonwealth, and representatives of 19 associations were added to the committee for this purpose. Suggestions were requested from judges, clerks and members of the bar throughout the Commonwealth. The most complete discussion received was from Robert T. Bamford, Esq., of Ipswich, a member of the Essex County Bar who is also clerk of the Third District Court of Essex. As this discussion touches most of the aspects of the problem with constructive suggestions, it is printed for the information of the bench and bar for study and convenient reference, just as we have printed in the Quarterly almost all of the previous discussions of this difficult controversial problem. As in all other cases, neither the Massachusetts Bar Association, nor the Editor, assumes any responsibility for the views expressed. The paper is printed as a well-written, thoughtful, contribution which deserves to be called to the attention of the profession.

A Brief Review of Developments Since 1900.

In the 19th century justices of the peace were gradually succeeded by local courts which were established from time to time in different parts of the commonwealth by legislative action without any carefully thought out plan for the development of the judicial system as a whole to meet modern needs, so that we have seventy-two district courts in addition to the Municipal Court of the City of Boston, which is the largest of them all having the largest volume of business of any court in the Commonwealth.

The study of the problems in the present century began about 1909 with the pamphlet by Mr. Justice Lummus, then a district court judge, on, "The Failure of the Appeal System". This was followed in 1912 by the report of the special Commission on the Courts of Suffolk County (House Doc. 1638 of 1912), which resulted

in the experiment in the Boston Municipal Court of the present system of single trials in civil cases and the system of election by the parties under the removal plan between such a single trial in the Municipal Court or by removal in the Superior Court. After ten years of experience in that court and repeated consideration by the legislature of proposals to extend the removal system to other district courts, following the recommendation of the Judicature Commission (House 1205 of 1921), the system was thus extended by St. 1922, Chap. , and at the same time the Administrative Committee of the District Courts was created as an advisory body for the assistance of the justices, clerks and probation officers in co-ordinating the work of the district courts and developing improved and more uniform administrative practices. The appellate divisions, for the hearings of questions of law, also were created at this time.

The passage of the compulsory motor vehicle insurance law in 1925 resulted in a marked increase in motor vehicle accident litigation, and, together with the increase of other business, developed new problems of congestion and expense, particularly in the Superior Court.

The Judicial Council, which was created in 1924 for the continuous study of the judicial system, had recommended in its first report in 1925 (pages 47–50), the removal of the previous jurisdictional limits of the district courts. This recommendation was adopted by the legislature in 1929. Meanwhile, in its 4th. and 5th. Reports, the Judicial Council had prepared statistical tables showing the amounts claimed in writs and the amounts of verdicts and findings in all cases tried with, or without, juries in all counties during the years ending June 30th, 1928 and 1929 in the Superior Court. In the 3rd. Report, in 1927, there was a comparative study of the cost of trial in the different courts.

Various aspects of the district court problems were discussed in each annual report of the Judicial Council and suggestions were made, some of which were adopted. The work of the Administrative Committee of the District Courts in its regional conferences with judges and other officials and in its semi-annual circular letters did much to bring about a more unified system and improved practice. Since 1930, there has been a continuous and increasing discussion of these courts, not only by the Judicial Council, but by special committees, commissions and bar association committees. A list of these different studies, beginning with 1930, follows:

F. W. G.

NOTE.

BIBLIOGRAPHY OF DISCUSSIONS OF DISTRICT COURTS SINCE 1930.

Report of special commission of 1929 on Motor Vehicle Liability Insurance Law, Senate 280 of 1930, MASS. LAW QUARTERLY for Feb. 1930.

Report of Joint Committee on Public Expenditures, House 1250 of 1933, Part III, MASS. LAW QUARTERLY for Feb. 1933, pp. 94–106.

Report of "Wragg" Commission on Public Expenditures, Senate 250 of 1934, MASS. LAW QUARTERLY for Feb. 1934, p. 28.

Report of the "Crime" Commission, Senate 125 of 1934, MASS. LAW QUARTERLY for Jan. 1934.

Report of Committee of Boston Chamber of Commerce, MASS. LAW QUARTERLY for Feb. 1935.

Report of special Commission on Judicial System, House 1750 of 1936, MASS. LAW QUARTERLY for May, 1936.

Judge Zottoli's article on, "The Volume of Crime—Problems of Reduction," *Law Society Journal* for May, 1936.

Warner and Cabot, "Judges and Law Reform," published in 1936.

Report of special Committee of the Boston Bar Association on Judicial System, *Bar Bulletin* No. 137, Feb. 1938, and "Preliminary Supplement" to MASS. LAW QUARTERLY for Apr.-June, 1938.

Report of Judiciary Committee on Judicial System, House 1719 for 1938, MASS. LAW QUARTERLY, Preliminary Sup. for Apr.-June, 1938.

Recommendations of Committee of Association of Justices and Special Justices to the Judiciary Committee, 1937–1938.

Article by Albert Hurwitz, of the Boston Bar, on "The District Court System," *Law Society Journal* for May, 1939, p. 525.

Bill submitted by special Committee of Boston Bar Association, in 1939.

Bills reported by Judiciary Committee to Legislature, House 2314, 2372, 2282, of 1939.

Comments of the Taxpayers' Associations on bills submitted. See "Tax Talk", April and July, 1938.

Semi-annual circular letters of Administrative Committee of the District Courts.

In addition to the foregoing reports, there has been a discussion of District Court problems in each of the annual Reports of the Judicial Council since 1930 together with statistical tables of business and comparative tables covering a period of years. In Appendix A of the 10th. Report, a statistical picture of business, personnel and cost of each of the 73 District Courts of the state was presented, and has formed a background for much of the discussion since that time.

A discussion of the extent of the legislative power over the office of special justice appeared in MASS. LAW QUARTERLY for October, 1936 (pp. 17–19), and a discussion of the constitutional problems to be considered in the reorganization of district courts in a county or other selected area will be found in the QUARTERLY for Jan.-Mar. 1939 (pp. 3–9).

The first and second Reports of the Judicature Commission in 1919 and 1920, MASS. LAW QUARTERLY for Jan. 1920, and Jan. 1921, provided the background for most of the discussion of the judicial system since that time. The first report dealt entirely with small claims procedure, which was adopted in 1920. The second report contained a discussion of District Courts (pages 33–58).

While all the 15 Reports of the Judicial Council since 1924 have contained something relating directly or indirectly to the District Courts, the principal discussions will be found in the first Report, 1925 (pp. 45–53, and p. 116); 2nd Report (p. 85); 3rd Report (pp. 16–21 and 71); 5th Report (pp. 25–33 and 52 and 58); 7th Report (pp. 17 and 67); 8th Report (p. 99); 9th Report (pp. 25–34 and 97); 10th Report (pp. 9–34 and pp. 63–96 —pictures of the 73 District Courts); 11th Report (pp. 8–16 and 23–35); 12th Report (pp. 11–39); 13th Report (pp. 10–28); 14th Report (pp. 16–26); 15th Report (pp. 13–17).

PROPOSED REORGANIZATION OF THE DISTRICT COURTS.

Prepared by

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The most important problem facing the Bar of Massachusetts today is a complete reorganization of the District Courts. This is necessary for a number of reasons:

1. To relieve the present congestion in the Superior Court.
2. To establish a system of full time judges.
3. To eliminate the growing criticism and distrust of the District Courts.
4. To forestall the possibility of the creation of a motor vehicle accident board.
5. To provide a method whereby litigants may be assured of trial of their causes within a reasonable time.

We are now trying to carry the 1940 case load with an 1859 model. Piecemeal legislation has attempted from time to time to replace worn out parts, but the machinery itself will not work much longer under present day conditions.

To properly solve the problems confronting us, a major operation is necessary and the bar should initiate the needed legislation before some group of unskilled mechanics makes matters worse for litigants, the bench and especially the members of the bar. To effectuate the needed change, I submit the following data with a brief plan of procedure and certain statistics obtained from the reports of the County Treasurer of Essex County, the reports of the Judicial Council, the reports of the Administrative Committee, House Document No. 1719 of 1938 and from various statutes covering procedure in Massachusetts. I, necessarily, state certain elemental principles:

1. Courts of law are necessary in an organized society.
2. To provide the service of courts, expense is entailed and this must be recognized.
3. The courts are not a revenue producing agency and should not be so considered. They are a service rendered to the public.
4. The courts must have the respect of the public if our form of government is to survive.
5. The administration of justice must be in the hands of honest, efficient and properly paid justices who are not in any way directly or indirectly engaged in the practice of law.

6. Litigants before the court are entitled to and should have the right to a speedy and fair trial of their causes.
7. Jurisdiction and venue of Superior and Circuit Courts should be clearly defined. Conflict and concurrent jurisdiction of Superior, Circuit and Probate Courts should be eliminated. Appeal and removal evils should be abolished and double trials eliminated.
8. Judges should be relieved from duties which are purely administrative and such duties should be assigned to Clerks.

We have in Massachusetts two separate and distinct systems of trial courts, one the Superior Court which is heavily overloaded with litigation and, the other the District Court which is heavily overloaded with personnel for the amount of litigation handled. The Superior Courts are intended primarily for the trial of causes before juries and for Equity and other jury-waived business and the present system provides adequate and proper facilities for the trial of matters coming before it. It is in the District Court where the improvements must be made and by making such improvements and changes the overloaded litigation in the Superior Court will be solved.

The district courts were originally intended as local tribunals for the trial of minor matters, something in the nature of a trial justice court. This was in the days of the horse and buggy when travel for any distance was a hardship during the greater part of the year. Modern methods of transportation have overcome this difficulty so that a system which might be termed the circuit court of the county, should replace the present outmoded district court system.

From time to time the jurisdiction of the district courts has been increased so that at the present time the district courts, in so far as civil matters are concerned, are on an equal footing with the Superior Court with the exception of certain equity matters and the present district courts have certain original and exclusive jurisdiction which the Superior Court does not have; for example, supplementary process which is actually equity, its decrees being enforced by contempt proceedings.

The primary cause of the overload in the Superior Court at the present time and the father of the auditor system is the motor vehicle tort litigation. An attempt was made some years ago to control this litigation by an act which provided that all actions in automobile tort cases must be commenced in the district court. This was intended to keep as much litigation in the district courts as possible and thereby relieve the Superior Court. However, it did not work out that way. The right of removal has been seriously abused and, to my personal knowledge, for delay only. All of this litigation can and should be kept in a reorganized district court without, however, prohibiting the right to a jury trial. This can be accomplished if the district courts are reorganized.

REORGANIZATION.

In order to illustrate the system which I propose, I shall confine myself to its proposed organization in Essex County with which I am thoroughly familiar. If such a system can be made workable in Essex County, it is fair to assume that the same system can be adapted to other counties with the exception of Suffolk County. It could at least be tried in Essex County.

Essex County at the present time has nine judicial districts, each district presided over by a standing justice and two, and in some courts three, special justices making a total of nine presiding justices and 20 special justices. Each of these district courts, with one or two exceptions, has at present, adequate quarters for the trial of cases.

There would be created what could be termed the Circuit Court of Essex County with nine judges, one of whom would be designated Presiding Justice by the Chief Justice of the Supreme Judicial Court as appellate justices are now designated. All writs would be returnable to the Circuit Court of Essex County and triable in any session in the county, districts being abolished. The clerk of the Circuit Court would have a central office and we will assume for the moment that it would be in Salem. That central office would have one chief clerk with 10 clerical assistants. All paper work, dockets, cash books, writs and other documents would be kept at the central office to which all matters would be referred.

In addition to the nine justices there would be the clerk of the Circuit Court and nine assistant clerks as already suggested, each justice having his own clerk or one assigned to him for the particular session in which he was presiding. This would constitute the personnel of the organization exclusive of probation which can remain as it is now.

The question of the proper establishment of the various sessions of the Circuit Court is very important. This is a detail which cannot be established immediately by a hard and fast rule, but would necessarily have to be sufficiently elastic to allow sessions to be held at such times and places as the load required.

The First District Court of Essex County, now sitting in Salem, has jurisdiction over Salem, Beverly, Manchester, Danvers, Topsfield, Hamilton, Wenham and Middleton. The Justice usually handles the criminal side and is now occupied with these duties on an average of two hours a day. Civil cases are tried on Wednesday and it is the practice to call in one or more special justices as the occasions arise to hear civil cases. The office of the clerk is open from 9 a. m. to 4 p. m. There is a clerk and three clerical assistants.

The Second District Court, sitting in Amesbury, has jurisdiction over Amesbury, Salisbury and Merrimac. There is one justice and two special justices. The case load in this court is not excessive and the entire civil and criminal litigation occupies

but little of the judge's time. There are occasions, of course, when a justice is engaged all day in court, but there are many days when he is engaged but a short time. The Second District Court has a clerk, no assistant clerk and no clerical assistants, the entire work being performed by the clerk himself.

The Third District Court sits in Ipswich and has jurisdiction over Ipswich and, on an average, about 300 criminal cases a year, one-half of which are drunk cases and very quickly disposed of. There is seldom more than one session of the court, the justice handling all of the criminal matters, except when he is assigned to sit in the Superior Court about thirty weeks a year, when it is necessary to call in a special justice from either Salem or Newburyport.

The District Court of Eastern Essex, with jurisdiction over Essex, Gloucester and Rockport, has a justice who handles practically all of the civil and criminal cases and is engaged but a portion of each day. There is a clerk of the court and one clerical assistant.

The Peabody District Court, with jurisdiction over Peabody, has a justice, a clerk and one clerical assistant. The court is not in session all day, except on rare occasions.

The Haverhill District Court and the Lawrence District Court and the District Court of Southern Essex handle a large bulk of the litigation in Essex County. The justice of the Amesbury District Court and the justice of the Newburyport District Court could be very easily assigned for a session in either Haverhill or Lawrence and could reach either of these places within one-half hour from their respective homes.

It is a well known fact that in none of the district courts do the justices preside a full day. It is only in exceptional cases and these are indeed rare, that any district court is in session for a full day. There are actually about 20 hours of criminal sittings per day in the nine courts.

In none of the district courts of Essex County is there more than one day assigned as civil day. Criminal sessions are held daily, but only a portion of each day is devoted to criminal matters. It has been the practice, on the so-called civil day, for the justice to assign a special justice to hold the civil session.

If a continuous civil session were held in Lynn, Salem, Lawrence and Haverhill, the civil litigation could be adequately handled. Criminal sessions could be held in other places wherever the criminal load made it necessary. For instance, a criminal session might be held one day a week in Ipswich, one day a week in Gloucester, one day a week in Newburyport and, perhaps, a criminal session would be necessary every day in Lynn, Lawrence and Salem, but, in case of arrests made in other places, arraignment and trial could be assigned to any one criminal session wherever sitting. Thus, a civil session sitting in Lawrence, or Lynn, might have assigned to it a list of cases for a week. All

writs would be returnable to the Circuit Court of Essex County and could be tried in any one of the civil sessions, the present districts of course, being eliminated.

It might also be possible to combine the criminal business of some of the smaller courts so as to relieve the burden on police departments; for example, a criminal session might sit two days a week in Amesbury, two days a week in Newburyport, or such time as might be necessary. Criminal matters from Peabody might be heard in Salem or Lynn, Peabody being very close to both places. A criminal session sitting at Gloucester could take over the criminal work of cases originating in Manchester if no criminal session were sitting in Salem at the time. As has been heretofore stated, the question of sessions necessarily would be an administrative detail which would have to be arranged after the reorganization of the courts. This question of sessions should be left entirely to the presiding justice; otherwise the proposed elasticity of the courts would be destroyed. The bill itself should merely create the foundation and the architectural structure, the details of administration of the system to be left in the hands of the presiding justice.

In all prior hearings with reference to this matter, much concern has been expressed as to the fate of the special justices. So long as district courts, as now constituted, are in operation, special justices will be necessary, but the activities of certain special justices have in great measure brought about the necessity of a change. Special justices were originally appointed for the purpose of presiding only when the justice for some reason or other, found it necessary to be absent, and, as populations grew, it was necessary to have more than one session in the courts.

These special justices were called upon to preside at extra sessions. With the modern methods of transportation, these justices became, automatically, unnecessary. Of course, the special justices have no vested rights to sit and when, in the improvement of the judicial machinery, it becomes necessary to eliminate certain personnel, it must be done gradually by making no further appointments.

The use of auditors begun some years ago, would also cease automatically. The auditors were appointed, temporarily, for the purpose of relieving the congestion in the Superior Court. If a Circuit Court were created, the necessity of auditors would be eliminated. The auditor system may become dangerous. As it is now, it constitutes merely another judicial body and may, possibly, create a group, with the impression that they have a vested interest such as we now have with the special justices, and it is very possible that a system of auditors may eventually bring forth a motor vehicle accident board which would be very dangerous to the welfare of the bar.

There are now five trial justices in Essex County with very limited jurisdiction over criminal matters and no jurisdiction over

civil matters. The creation of a Circuit Court would automatically abolish the position of trial justices as they would become unnecessary and are merely a survival of an ancient system. The statute now contemplated their gradual elimination, see G. L., c. 31.

Assuming that the Circuit Court is established, the presiding justices, should be prohibited from engaging, either directly or indirectly, in the practice of law and should disassociate themselves from all legal work. They should receive a proper salary and should devote their entire time to their judicial functions. In so far as possible, the present justices should be retained with the same recommendation as to such other member of the district court personnel as would be necessary.

The question has been raised as to the ability of the nine justices to handle the present litigation in Essex County in addition to such litigation as might remain in the district court as above stated. Of course a glance at the statistics of the district courts will show an enormous amount of litigation, but this does not tell the whole story. The fact that writs are entered is no evidence that cases are tried. As a matter of fact, only a small percentage of the cases entered ever reach trial. If a report could be obtained from each district court showing the number of cases tried and the amount of time involved, it would undoubtedly show that the nine justices can easily handle all of the existing litigation in the district court and, in addition thereto, take over much of the litigation now clogging the docket of the Superior Court and the work now performed by the special justices, auditors and trial justices. I base this contention on an exhaustive study of the reports heretofore referred to.

Sittings.

If the Circuit Court were in session from, we will assume, 9:30 a. m. until 4:00 p. m., that is 5½ hours per day, and nine justices presiding, that would give us 49½ judge hours, per day, and I contend that under the present system, there are nowhere near 49½ hours per day devoted to court work inclusive of the judges, special justices, trial justices and auditors.

The justices would report each morning to the court where they were assigned to hold necessary sessions. If five judges were assigned for a month to hear civil cases at definite points, the other four assigned to criminal cases would preside at such places as had been previously assigned and all criminal matters originating in the county and ripe for trial would be assigned to one of these sessions. All judges would from time to time rotate from court to court on both criminal and civil business. This would eliminate the criticism that judges should not preside exclusively in one district. If a judge were assigned on the criminal side to preside in Ipswich one day a week and, perhaps, two days a week in Peabody, or two days a week in Newburyport, he could easily dispose of the

criminal business and be available for an extra sitting on the civil side if such became necessary. This is another detail which would have to be worked out as a matter of administration and would be worked out in a manner similar to that in the Superior Court.

Motor Tort Cases.*

These actions must be brought in the proposed circuit court. If either party desires a jury trial, the case may be removed to the Superior Court as at present. However, the compulsory insurance policy should be so written that the insurance company would be liable only for a judgment obtained in the circuit court. If the plaintiff removed to the Superior Court, he would lose his right against the insurance company and must look to the defendant for the satisfaction of any judgment obtained. If the defendant removed to the Superior Court, he would lose the benefits of his policy and would be personally liable for any judgment obtained in the Superior Court, unless for an additional premium he had voluntarily insured himself against a judgment in that court. It is unbelievable that either party under these conditions would remove a case in which there was only the compulsory insurance. This is not denying a right to a trial by jury and is analogous to the procedure established upon the creation of the Industrial Accident Board whereby employers were not compelled to take out insurance, but if they failed to do so, lost their common law defenses. It is only a method of combating dilatory tactics and keeping the judicial machinery from being "stymied" by a technicality.

As an alternative procedure, I recommend the following:

That the insurance statute be so revised that waiver of jury trial shall be a condition of the right of the plaintiff to reach the defendant's insurance. If the plaintiff insists on an expensive jury trial, he loses his right against the insurance company after judgment and must look to the defendant for satisfaction of any judgment obtained. If the defendant removes to the Superior Court and insists on a jury trial he would be liable for plaintiff's counsel fees as additional costs in the discretion of the court if a verdict is obtained against him. Under these conditions relatively fewer cases would be removed.

As another alternative procedure, I recommend:

That all motor vehicle tort actions must originate in the circuit court, there to be heard by the justice who will make up a report of the material facts as is now done by auditors. In case either party is dissatisfied with the report and desires a trial by jury, he may appeal and the case submitted to the jury on the report unless one of the parties to the action files an Insistance and Reservation motion in which case of course he is entitled to a jury trial with the right to introduce testimony in addition to the report.

* There is no constitutional right to insurance security for the plaintiff. It is a statutory right which may be subjected to conditions. The right to jury trial is subject to reasonable regulations which do not substantially impair the right (See *Bothwell* v. *Boston El. Ry.* 215 Mass. at pp. 422–3 and cases cited). Cf. Draft Act in 4th Report of the Judicial Council p. 17 (§§ 2–3).

Contract Actions.

In so far as contract actions are concerned, all contract actions, where the amount sought to be recovered according to the declaration is less than $3000, must be brought in the circuit court with the right of appeal upon the payment of a small jury fee. In order to accomplish this, some change would be necessary in Chapter 532 of the Acts of 1922. In order to simplify civil procedure in the circuit court, a wider use of Section 69 of Chapter 231 of the G. L. should be encouraged and upon filing of an action, counsel should be furnished with forms provided by the court for the admission of facts and documents. Provision should also be made that within 5 days prior to the trial of a case, counsel should file certain stipulations with reference to issues, something in the nature of the pretrial system in the Superior Court. Forms for stipulations should be provided counsel and they should either answer that no agreements as to issues could be made, or that certain matters were admitted and others denied, for the purpose of eliminating the necessity of summoning witnesses and proving minor matters which can be admitted before trial. Certain motions should be referred to the clerk of the court rather than to take up the time of the judge, as is now done in the federal courts.

Small Claims and Supplementary Process.

The handling of small claim cases can be greatly simplified and thereby relieve the judges of the circuit courts from much of the work now entailed. I suggest the following procedure as it has worked favorably in our court:

The parties go before the clerk. If the defendant denies the claim and desires trial, the matter is referred to the judge. If, however, the defendant admits the claim, he can either pay the plaintiff on the spot, or, if he desires time and the parties can agree on the terms of a decree, it is drawn up and thereafter submitted to the court for its approval.

Supplementary Process may be simplified by the same method. The creditor and the debtor would appear before the clerk, the clerk would swear the debtor, the questions and answers would be taken in writing and then submitted to the court for an order if the debtor and creditor would be willing to enter upon a decree, this might be prepared by the clerk and submitted to the court for approval. This procedure has also worked satisfactorily in our court.

Many other matters may be handled in the same manner thus relieving the courts of much of the unnecessary detail work.

Criminal Business.

As to criminal matters, we have another problem. Consulting the statistics of the district court for the period of October 1, 1938 to October 1, 1939 I find there were 149,937 criminal cases begun.

Of these, 63,361 or about 40%, were for drunkenness. Without doubt 95% pleaded guilty and many of them were first offenders. A wider use of the release power by the probation department would eliminate a large percentage of these drunk cases as many of them are first offenders or at least first offenders within a year. Few of them are vicious and are brought in merely for their own protection.

The next greatest number were automobile cases totaling 48,568. Of this number only 4,409 were operating "under the influence." The others were probably at least 90% minor infractions of the motor vehicle laws. The statistics do not show the number of cases in which pleas of guilty were made, but, with the exception of the more serious offenses, it is safe to say that at least 75% pleaded guilty in the automobile cases so that in so far as the actual trial of a criminal case is concerned, they were in the small minority. The statistics show that of the criminal cases commenced in Massachusetts during this period, 4,867 were appealed. To relieve the district attorney's office and the criminal side of the Superior Court, I propose the following:

Upon the arraignment of the defendant in a criminal case in the circuit court, he shall be asked whether or not he wants a jury trial. If he waives his jury trial, he will abide by the decision of the circuit court. If he refuses to waive his right to jury trial, the case will be immediately sent to the Superior Court and he will be bound over for the next sitting of the Superior Court in the county. I believe that this will decrease the number of appeals and will certainly eliminate the two bites at the cherry.

Further, in all criminal matters before the circuit court, counsel should agree upon issues before trial. As an example, and this has actually happened—prior to trial of an operating "under the influence" case, counsel for the government and counsel for the defense were asked by the presiding justice if they could agree that it was a public way and that the defendant was then and there the operator of the car. Upon this agreement having been made, the only issue before the court was the question of the operator's sobriety at the time. This eliminated the summoning of witnesses and the introduction of unnecessary evidence, all of which takes time.

Practice and Procedure.

The service of process should be simplified in order to reduce costs. In many cases involving less than $100 costs sometimes equal 10% of the judgment. Service by Registered Mail, personal return receipt demanded, has worked very satisfactorily in small claim cases. This procedure could very well be adapted to all cases subject when necessary to an order for further service in the discretion of the court. In actions in contract brought on a common count, the writ and declaration should be combined, that is the declaration should be contained in the writ. This would be for

the purpose if nothing else of reducing the amount of paper work in the clerk's office.

Some change in the answers should be made whereby allegations in the declaration are either specifically denied or admitted. This change would be for the purpose of reducing causes to specific issues.

Ejectment writs, in addition to describing the close and alleging the unlawful withholding thereof, should contain also an allegation that the proper notice has been served on the defendant and the defendant's answer should require a denial of this allegation; otherwise same should be taken as admitted and not require further proof.

Under the present system the demandant must prove that notice has been served and testimony to that effect produced.

Supplementary Process has developed into a major factor in the district courts. Procedure in Supplementary Process can and should be simplified. At present the creditor files an application and the execution requesting that a citation issue returnable at some stated date. After hearing, if an order is made and the debtor fails to comply with the order, it becomes necessary for the creditor to file a petition for an order to show cause and this must be served by an officer at additional expense. I suggest that after hearing, the case stand continued to a date certain for a report on compliance with the order, both creditor and debtor to appear at which time the court after hearing the parties can further continue under the same or different order or finding on contempt which would be a saving of work in the clerk's office and additional expense of service of process.

The Question of Travel.

The question of travel of the judges from place to place must be considered. The presiding justice of the Gloucester Court who lives in Manchester, could easily reach either the Lynn, Ipswich, Peabody or Salem courts within half an hour. The presiding justice of the Peabody Court could reach either Lynn or Salem courts within 15 minutes and could reach the Ipswich Court and Lawrence and Haverhill courts within half an hour. The presiding justice at Ipswich is within one hour's drive of Lawrence and Haverhill and within half an hour's drive of Salem, Gloucester, Newburyport and Lynn. The presiding justice of any of the courts in Essex County are within, at the most, an hour's drive from the court situated farthest from their home. It should be borne in mind that the present time we have the question of travel.

In consulting the Treasurer's report, I find that the First District Court has called upon judges from Peabody from time to time; the Third District Court has called upon special justices from Newburyport and Salem; the court in Haverhill has called upon judges from Amesbury; the court of Gloucester had special justices from Newburyport, Peabody, Salem, Boston and Amesbury; the

District Court of Southern Essex at Lynn has had judges from Boston, Peabody and Salem. This same rule holds forth for all district courts so that the question of travel is not a new one.

Costs.

Upon consulting the annual report of the County Treasurer of Essex County, I find that there was paid to the justices, special justices, trial justices and auditors in Motor Vehicle cases for the year 1938 the sum of $71,835.12. Under the system which I propose, the offices of special justice, trial justice and the services of the auditors would be entirely eliminated. The nine judges of the circuit court would draw $7500 and the presiding justice would draw in addition thereto the sum of $1500, making a total of $69,000. The justices of the circuit court would draw, as well, traveling expenses at the rate of 4½ cents a mile.

Again consulting the report of the County Treasurer, I find that there was paid to the clerks of the courts in 1938, $23,844. This includes the assistant clerks. Under the system I propose the cost of clerks will amount to $29,500. The cost of clerical assistants in 1938 was $19,990.71 and under the proposed plan, the cost of clerical services will amount to $18,500. No estimate has been made as to the other personnel of the district court such as probation officers as that requires no change. Five of the district courts in Essex County have clerks, but no assistant clerk, two of the clerks have neither assistant clerks nor clerical assistants, the entire work being done by the clerk of the court. Three district courts have but one clerical assistant. The clerical assistants at present total 15.

In the circuit court there would be a chief clerk at $5000, nine assistant clerks at $3500 and ten clerical assistants.

Transportation of Prisoners.

The question was raised recently as to cost of transportation of prisoners to criminal sessions and the disposition of prisoners waiting trial. Under our present system we have the cost of travel of prisoners; for instance, when arrests are made in Manchester, the prisoners are taken to Salem for trial. When arrests are made in Rowley, the prisoners are taken to Newburyport for trial; when made in Hamilton, the prisoners are taken to Salem for trial; when made in Newbury the prisoners are taken to Newburyport for trial; when made in Lynnfield, the prisoners are taken to Peabody for trial. So that we now have travel for prisoners. In so far as disposition of prisoners arrested is concerned, they would be arraigned immediately before the criminal session nearest the place of arrest, or, if bailed, bailed to appear at a stated criminal session and either tried or bound over for trial at some future criminal session.

The question has been raised regarding the possibility of so relieving the Superior Court that there would not be enough work load in that tribunal. It must be kept in mind that many judges of our Superior Court today are spending long hours at night hearing motions for new trials, checking over requests for instructions, requests for rulings of law, requests for findings of fact and consulting decisions on matters pending before them which they cannot do during court hours. This of course is a hardship on the judges of the Superior Court and this proposed arrangement should create a rest for them which would probably improve their dispositions the following day.

It is my contention that the circuit court system would be an enormous improvement over the present district court system from the standpoint of the police, the litigants, the members of the bar and the bench; that there would be a saving in cost of operation of the courts; that there would be a rotation of the judges from place to place; that the judges would be on a full time basis; that the criticism of the present activities of judges and special justices would be entirely eliminated; that procedure could be greatly simplified; that the question of venue of the courts would be eliminated; that the congestion in the Superior Court would be eliminated; that there would be certain exclusive jurisdiction of both of our trial courts; that the work of the district attorney would be greatly simplified; that criminal appeals would be reduced; that litigants could have their causes tried within a reasonable time after actions had been started.

It has been impossible to incorporate herein the great mass of detail necessary to make the change, but it is not an insurmountable object. This report is made after a thorough study of our system and its faults and giving due weight to its merits, if any, and is intended for the sole purpose of improving the efficiency of the courts.

If this report has any merit, the writer would appreciate very much the opportunity of appearing before any interested body and arguing its merits and answering any criticisms or questions by any person or persons or group who might be either in favor or opposed, or, perhaps, doubtful of its workability or efficacy, or doubtful of its intended results.

AN IMPORTANT DECISION ON PROBATE ACCOUNTING.

GUY NEWHALL.

In *Wilbur* v. *Hallett* the Massachusetts Supreme Court on March 28, 1940, handed down what appears to be a very important decision (1940 A. S. 643). X devised a parcel of real estate to A, together with a money legacy of $1,000. Pending a contest of the will a special administrator was appointed, with authority to take possession of the real estate. Partly with and partly without the express authority of the court he expended $1,383 on the upkeep of the parcel devised to A. The special administrator's account showing these payments was duly allowed, the allowance of the account being tantamount to prior authorization of the expenditures. *Dewey* v. *Burke*, 246 Mass. 435. When the executors were appointed they demanded reimbursement from A, but he refused. They thereupon set off his legacy against these charges and filed their first and final account showing payment to him of his legacy. This account was duly allowed. Later A filed a petition in equity in the probate court to recover his legacy. The probate court entered a decree authorizing the executors to make the set-off. From this decree the plaintiff appealed.

It was held that the suit did not lie. The court took the position that the plaintiff must be held to have had due notice of the proceedings on the account; that under the provisions of G. L. 206, § 4, the probate court, in settling an account, has full control over the proper application of the funds of the estate; that accounting is as if a proceeding in equity, and that as A could have raised the question of the propriety of the executor's act in withholding his legacy in a hearing on the account, the decree was final so far as he was concerned and could not be attacked in any collateral proceeding; further, a petition in equity to enforce the legacy was a collateral proceeding even though it was filed in the same court.

This decision seems to me to be as important for what the court did not say as for what it did say. In other words, the implications of the decision go far beyond the actual wording of the opinion. Under the new practice as to probate accounting, established by Statute 1938, c. 154, § 1 (now G. L. 206, § 24), the allowance of an account by the probate court is conclusive, and the decree cannot be impeached except for fraud or manifest error. Further, impeachment must be by a petition to reopen the case and modify the original decree, not by a separate proceeding as in this case. A decree allowing an account is conclusive as to every matter covered by the account, including apparently every question that could have been raised concerning any item in it, such as the propriety of the investments shown in Schedule C. No subsequent or collateral proceeding can be permitted to detract in any way from the full force of the decree allowing the account.

The decision has an important bearing on the practice of putting into an account items showing payment of legacies and distributive shares, but not actually making the payments until after the account has been allowed. (See last paragraph of § 213 of Settlement of Estates.) This practice has been quite common among lawyers, although severely frowned on by some of the judges. There was a line of earlier decisions holding that the allowance of the account did not prevent the legatee from later suing to recover his legacy if payment was not actually made. (See Settlement of Estates, § 202, n. l.) Hence no particular harm resulted from the practice. This case in effect overrules the earlier decisions, and would seem to make the above practice highly dangerous from the point of view of the unpaid legatee or distributee. His only relief would be by a petition to reopen the account, and this raises the question whether the court would consider it a case of "fraud or manifest error". The decision by implication drives home squarely the idea which probate judges have vainly tried to inculcate into the legal profession, namely, that no items should be included in Schedule B of an account which have not actually been paid. The only safe course for the legatee, distributee or payee is to secure actual payment before he signs a receipt or assents to the account. On the other hand it is almost unthinkable that the court would refuse to reopen the case, thereby allowing a fraudulent executor or administrator to retain money which did not belong to him.

WORKMEN'S COMPENSATION COSTS IN THE SUPERIOR COURT.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT — SUFFOLK COUNTY

Civil Business

Boston, April 12th, 1940.

To the Editor Massachusetts Law Quarterly:

St. 1939 c. 213 provides for costs in certain workmen's compensation cases. As the costs seem to be mandatory, I have attempted to establish the practice.

I am enclosing a copy of a letter to the Assistant Clerks of this office which will not only call the matter to the attention of the bar, but may also result in a uniform practice throughout the Commonwealth.

Yours very truly,

JAMES F. MCDERMOTT,

Clerk.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS. — SUPERIOR COURT

TAXATION OF COSTS IN PROCEEDINGS UNDER THE WORKMEN'S COMPENSATION ACT.

The attention of Assistant Clerks, the Execution Clerk, and others engaged in taxing of costs is directed to the provisions of Chapter 213 of the Acts of 1939 which took effect on September 1, 1939.

Unless otherwise ordered by the Court, the practice of taxing of costs in such proceedings is established as follows:

If the Claimant is the prevailing party he is entitled to the following costs:

1. Actual costs or disbursements:
   a. If certified copies are presented in Superior Court by the Claimant or his Attorney, the amount actually paid for such copies to the Industrial Accident Board. (Usually the charge for such copies is $2, $3, or $5. A receipt of payment to the I. A. B. will be required).
   b. Entry fee if paid by Claimant.....$3.00
   c. Brief S. J. C. as established by General Laws, Chapter 261, Section 25 .....
   d. The actual expense of copies and transmission of papers to the S. J. C. .....
   e. Entry fee S. J. C. if paid by the Claimant..... 3.00
   f. Claim before the Industrial Accident Board..... .50
2. Other Statutory Costs:
   a. .....Term Fee @ $5.00 per term.....
   b. Attorney's fee 1.25
3. If the Insurer is the prevailing party it is entitled to the foregoing items except the allowance of $.50 for the Claim before the I. A. B.
4. These items of costs are in addition to those which may be awarded by General Laws, Chapter 152, Sections 10 and 14.
5. The actual amount of costs should be taxed and inserted in the Decree before the Decree is entered.
6. The Execution Clerk or his assistant will tax the costs upon request and presentation of the papers.

JAMES F. MCDERMOTT,

April 1, 1940 — *Clerk.*

A form listing the items to be taxed and certified by the Clerk accompanies the instructions.